(1952); Cert. Rec. item 18, pp. 13-15 (brief below). (3) Whether the seizure on December 21, 1961 was sufficiently contemporaneous with the actual arrest by a state agent that occurred on December 26, 1961, 5 days after the arrest by federal agent Yates. See attached copy of the arrest warrant from Richmond Municipal Court. See also *People v. One 1939 Buick Coupe*, 56 Cal.App.2d 163, 166-167, 132 P.2d 308 (1942) (strict construction of forfeiture statute); *People v. One 1950 Mercury Sedan*, 116 Cal.App.2d 746, 749, 254 P.2d 666 (1953) (same).

Because the court below held the search of the car invalid, it was immaterial whether the underlying seizure of the car was valid until the *Preston* case was distinguished on this point in this Court's opinion. The validity of the seizure was never thoroughly considered in the courts below or unequivocally established by the evidence. Vital constitutional rights should not be lost in this manner.

CONCLUSION

An affirmance stops the California court from applying higher search and seizure standards in this case, from reconsidering its harmless error rules in light of *Chapman*, from eliminating the uncertainty now left in California law, and from ever considering thoroughly the now crucial and material question whether the underlying seizure of the car was valid. There is no good reason for such a result particularly since no specific holding of the California court

was affirmed and since such a result is easily avoidable by vacating and remanding under well-established principles of this Court.

It is respectfully submitted that the petition for modification of opinion and for rehearing should be granted and that the judgment of the California District Court of Appeal should be vacated and the cause remanded to that court.

Dated, San Francisco, California,
March 8, 1967.

MICHAEL TRAYNOR,
Counsel for Petitioner
By appointment.

JARED G. CARTER,
ANTHONY C. GILBERT,
DONALD H. MAFFLY,
PREBLE STOLZ,
Of Counsel.

CERTIFICATE OF COUNSEL

I, Michael Traynor, certify that the foregoing petition for modification of opinion and for rehearing is presented in good faith and not for delay.

MICHAEL TRAYNOR,
Counsel for Petitioner
By appointment.

(Appendix Follows)

IN THE
MUNICIPAL COURT OF THE JUDICIAL DISTRICT OF THE CITY OF RICHMOND,
COUNTY OF CONTRA COSTA, STATE OF CALIFORNIA

THE FOREGOING INSTRUMENT IS A CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE.

ATTEST: MAR 6 1967

JAMES L. LINDON, CLERK OF THE MUNICIPAL COURT OF THE CITY OF RICHMOND, STATE OF CALIFORNIA.

By Marie Mergid
Deputy Clerk

The People of the State of California,
Plaintiff,

vs.

JOE COOPER

Defendant.

122160

The People of the State of California,

To any Sheriff, Constable, Marshal or Policeman in this State:

Complaint upon oath having been this day made before me, CHAS. H. BALDWIN Judge of The Municipal Court of the City of Richmond, in said County of Contra Costa, by HOWARD GROOM that the offense of FELONY, TO WIT: VIOLATION OF SECTION 11501 CALIFORNIA HEALTH AND SAFETY CODE and SECTION 220 CALIFORNIA PENAL CODE has been committed, and accusing JOE COOPER *thereof.*

You are therefore commanded forthwith to arrest the above named DEFENDANT and bring HIM before me forthwith in Department No. 3 of said Municipal Court, Hall of Justice, Civic Center, Richmond, California, or in case of my absence or inability to act, before the nearest and most accessible magistrate in this county.

The defendant is to be admitted to bail in the sum of $2,000.00 + PA $100.00

Witness my hand and the seal of said Municipal Court, at Richmond, California, this 26th day of December 1961 at the hour of 1:50 o'clock P M. and I direct that this warrant may be served at any hour of the day or night.

Chas. H. Baldwin
Judge of the Municipal Court of the Judicial District of the City of Richmond.

The above warrant was received on the 26 day of December, 1961, and the said Joe Cooper arrested thereon at Richmond, on the 26 day of December, 1961, and brought before the above-entitled Court this ____ day of ____ 19__.

[illegible]
Deputy Marshal
Police Officer of the City of Richmond.

The said defendant having been brought before me on this warrant declares HIS true name to be JOE COOPER and said defendant is hereby committed to the custody of the SHERIFF County of Contra Costa, until HE can be tried or examined on said charge, and BE admitted to bail in the sum of $ 2000.00 plus [illegible] and stands committed until HE gives such bail.

Dated December 26, 1961

Chas. H. Baldwin
Judge of the Municipal Court of the Judicial District of the City of Richmond.

59-7—5M—AP90

SUPREME COURT OF THE UNITED STATES

No. 103.—October Term, 1966.

Joe Nathan Cooper, Petitioner, v. State of California.	On Writ of Certiorari to the Supreme Court of California.

[February 20, 1967.]

Mr. Justice Black delivered the opinion of the Court.

Petitioner was convicted in a California state court of selling heroin to a police informer. The conviction rested in part on the introduction in evidence of a small piece of a brown paper sack seized by police without a warrant from the glove compartment of an automobile which police, upon petitioner's arrest, had impounded and were holding in a garage. The search occurred a week after the arrest of petitioner. Petitioner appealed his conviction to the California District Court of Appeal which, considering itself bound by our holding and opinion in *Preston* v. *United States*, 376 U. S. 364, held that the search and seizure violated the Fourth Amendment's ban of unreasonable searches and seizures. That court went on, however, to determine that this was harmless error under Art. VI, § 4½, of California's constitution which provides that judgments should not be set aside or reversed unless the court is of the opinion that the error "resulted in a miscarriage of justice." 234 Cal. App. 2d 587. The California Supreme Court declined to hear the case. We granted certiorari along with No. 95, *Chapman* v. *California*, *ante*, to consider whether the California harmless-error constitutional provision could be used in this way to ignore the alleged federal constitutional error. 384 U. S. 904. We have today passed upon the question in No. 95, but do not reach it in this case because we are satisfied that the lower court erroneously decided that

our *Preston* case required that this search be held an unreasonable one within the meaning of the Fourth Amendment.

We made it clear in *Preston* that whether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case and pointed out, in particular, that searches of cars that are constantly movable may make the search of a car without a warrant a reasonable one although the result might be the opposite in a search of a home, a store, or other fixed piece of property. 376 U. S., at 366–367. In *Preston* the search was sought to be justified primarily on the ground that it was incidental to and part of a lawful arrest. There we said that "once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." *Id.*, at 367. In the *Preston* case, it was alternatively argued that the warrantless search, after the arrest was over and while Preston's car was being held for him by the police, was justified because the officers had probable cause to believe the car was stolen. But the police arrested Preston for vagrancy, not theft, and no claim was made that the police had authority to hold his car on that charge. The search was therefore to be treated as though his car was in his own or his agent's possession, safe from intrusions by the police or anyone else. The situation of petitioner's car is quite different.

Here, California's Attorney General concedes that the search was not incident to an arrest. It is argued, however, that the search was reasonable on other grounds. Section 11611 of the California Health and Safety Code provides that any officer making an arrest for narcotics violation shall seize and deliver to the State Division of Narcotic Enforcement any vehicle used to store, conceal,

transport, sell or facilitate the possession of narcotics, such vehicle "to be *held as evidence* until a forfeiture has been declared or a release ordered."[1] (Emphasis supplied.) Petitioner's vehicle, which evidence showed had been used to carry on his narcotics possession and transportation, was impounded by the officers and their duty required that it be kept "as evidence" until forfeiture proceedings were carried to a conclusion. The lower court concluded, as a matter of state law, that the state forfeiture statute did not by "clear and express language" authorize the officers to search petitioner's car. 234 Cal. App. 2d, at 598. But the question here is not whether the search was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment. Just as a search authorized by state law may be an unreasonable one under that amendment, so may a search not expressly authorized by state law be justified as a constitutionally reasonable one. While it is true, as the lower court said, that "lawful custody of an automobile does not of itself dispense with constitutional requirements of searches thereafter made of it," *ibid.*, the reason for and nature of the custody may constitutionally justify the search. Preston was arrested for vagrancy. The arresting officers took his car to the station simply because they did not wish to leave it on the street. It was not suggested that they did

[1] Cal. Health & Safety Code § 11610 provides:

"The interest of any registered owner of a vehicle used to unlawfully transport or facilitate the unlawful transportation of any narcotic, or in which any narcotic is unlawfully kept, deposited, or concealed or which is used to facilitate the unlawful keeping, depositing or concealment of any narcotic, or in which any narcotic is unlawfully possessed by an occupant thereof or which is used to facilitate the unlawful possession of any narcotic by an occupant thereof, shall be forfeited to the State."

this other than for Preston's convenience or that they had any right to impound the car and keep it from Preston or whomever he might send for it. The fact that the police had custody of Preston's car was totally unrelated to the vagrancy charge for which they arrested him. So was their subsequent search of the car. This case is neither *Preston* nor controlled by it. Here the officers seized petitioner's car because they were required to do so by state law. They seized it because of the crime for which they arrested petitioner. They seized it to impound it and they had to keep it until forfeiture proceedings were concluded. Their subsequent search of the car—whether the State had "legal title" to it or not—was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained. The forfeiture of petitioner's car did not take place until over four months after it was lawfully seized. It would be unreasonable to hold that the police, having to retain the car in their garage for such a length of time, had no right, even for their own protection, to search it. It is no answer to say that the police could have obtained a search warrant, for "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." *United States* v. *Rabinowitz*, 339 U. S. 56, 66. Under the circumstances of this case, we cannot hold unreasonable under the Fourth Amendment the examination or search of a car validly held by officers for use as evidence in a forfeiture proceeding.

Our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so. And when such state standards alone have been violated, the State is free, without review by

us, to apply its own state harmless-error rule to such errors of state law. There being no federal constitutional error here, there is no need for us to determine whether the lower court properly applied its state harmless-error rule.[2]

Affirmed.

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[2] Petitioner also presents the contention here that he was unconstitutionally deprived of the right to confront a witness against him, because the State did not produce the informant to testify against him. This contention we consider absolutely devoid of merit.

us to apply its own state harmless-error rule to such errors of state law. There being no federal constitutional error here, there is no need for us to determine whether the lower court properly applied its state harmless-error rule.

Affirmed.

[3] Petitioner also presents the contention here that he was unconstitutionally deprived of the right to confront a witness against him, because the State did not produce the informant to testify against him. This contention we consider absolutely devoid of merit.

SUPREME COURT OF THE UNITED STATES

No. 103.—October Term, 1966.

Joe Nathan Cooper, Petitioner, v. State of California. | On Writ of Certiorari to the Supreme Court of California.

[February 20, 1967.]

Mr. Justice Douglas, with whom The Chief Justice, Mr. Justice Brennan and Mr. Justice Fortas concur, dissenting.

When petitioner was arrested, his auto was seized by officers, pursuant to the California Health and Safety Code, § 11611. That section authorizes a state officer making an arrest for violation of the narcotics laws to seize a "vehicle used to unlawfully transport any narcotic or to facilitate the unlawful transportation of any narcotic, or in which any narcotic is unlawfully kept," and directs the officer to deliver the vehicle to the Division of Narcotic Enforcement "to be held as evidence until a forfeiture has been declared or a release ordered." About a week after petitioner's arrest, a state agent searched the car, which was stored at a tow service, and discovered a piece of brown paper which appeared to have been torn from a grocery bag. This piece of paper was introduced at the trial, along with two bundles of heroin, which petitioner allegedly sold an informer, and the brown paper in which the heroin had been wrapped.[1] Petitioner was indicted and convicted of selling heroin. A judgment of forfeiture of petitioner's car was entered the day after the termination of his trial.

[1] About four months after the arrest, another agent searched the car and found a marijuana seed, which was introduced at trial. There is no objection to this evidence since there was no jury and the trial judge indicated that the marijuana seed was irrelevant to the charge for which petitioner was being tried.